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NO. 86-651

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, et al.

Petitioners

v.

MISCO, INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Did the district court and the Fifth Circuit properly vacate a labor arbitration award on the grounds the award violates public policy?

2. If not, should the arbitration award be vacated on the grounds the award exceeds the arbitrator's power, is irrational, and is imperfectly executed?

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BRIEF FOR THE RESPONDENT

STATEMENT

Misco, Inc., the Company (respondent) and the unions (petitioners) were, at all times material herein, parties to a collective bargaining agreement covering the production and maintenance employees at respondent's paper-converting plant located in Monroe, Louisiana. The collective bargaining agreement contains procedures for filing a grievance and for pursuing arbitration. The powers of the arbitrator are limited by paragraph 3 of Article VI of the collective bargaining agreement as follows:

> a. He shall have no power to add to, subtract from or modify any of the terms of this Agreement or any supplementary agreement nor to rule on any matter except while this Agreement is in full force and effect between

the parties.

b. He shall have no power to substitute his discretion for the employer's discretion in cases where the employer is given discretion by this Agreement.

Joint Appendix at 19 (hereinafter cited as Jt. App.).

A management rights clause gave respondent full authority to manage its business including the right

> to reprimand, discharge or otherwise discipline employees; . . . to unilaterally establish, modify, and enforce the plant rules or regulations and/or disciplinary procedures, policies and practices; . . . the Company's failure to exercise any function or right in any particular way shall not be deemed a waiver of its rights to exercise such function or right . . . .

Jt. App. at 13-14 (Article IV(1)). Further, Article XI provided that the respondent "shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations regulating the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline." *Id.* at 20-21.

In its business, respondent takes rolls of paper and finishes the paper into different forms for the packaging industry. The record developed before the arbitrator established that the industry is a hazardous one, that the equipment and machinery used in the industry are hazaradous, and that the slitter rewinder which the grievant operated was considered particularly hazardous because of the sharp edges used to cut the paper into desired widths. For the four years prior to the arbitration hearing, ten to fifteen accidents had occurred on the slitter

rewinder which demonstrates the hazardous nature of that equipment. Appendix D of Petitioner's Petition for Writ of Certiorari at 31a-32a (hereinafter cited as App. D of Pet.).

Respondent's position has been and is that the use of drugs or alcohol impairs the judgment and coordination of operators of hazardous equipment and presents a danger to the operator and to other employees. Possession of drugs or alcohol at the workplace poses a significant risk that they will be used by employees while in the workplace. The impairment caused by use of drugs or alcohol is substantiated in the scientific community, judicial precedent, statutory law, and common sense.

In an effort to educate the employees in furtherance of its concerns for their safety, respondent took a strong position against the use or possession of drugs or alcohol in the workplace through the publication of bulletins, through employee meetings, and through the reaffirmation of its rules concerning such which had been in effect for almost a decade. App. D of Pet. at 32a. The rule involved in this matter was contained in the Company Rules under the heading *Causes for Discharge.* Rule II(1) provided that the following types of conduct were causes for discharge:

> 1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

Id. at 31a.

Prior to grievant's arrest at the plant on January 21, 1983, for possession of marijuana at his home, respondent had found disturbing evidence of violations of its no-drug

rule at its plant. Partially smoked marijuana cigarettes or "roaches" were found, along with empty beer cans and whiskey bottles. Additionally, respondent's foremen had reported they smelled at different times the odor of marijuana smoke at the plant, but that they were unable to locate the rule violators. *Id.* at 33a. Respondent's production manager even began living in a trailer located on the premises to try to apprehend the rule violators by surprise visits, but he was unsuccessful. Six months before the grievant's arrest, respondent's concern over drug use at its plant grew to the point that it held a special meeting of employees to warn them against possession or consumption of drugs or alcohol in the plant as prohibited by rule II(1). *Id.* at 33a-34a.

The drug problems appeared to be on the second shift, or night shift, which was the grievant's shift. This shift had significant problems with production and quality that were not encountered on the day shift. Most of the problems were caused by lack of accuracy and judgment typical of a drug- or alcohol-impaired employee. *Id.* at 33a. The grievant on occasions suffered from these typical problems of impairment. On August 5, 1982, he was formally reprimanded in writing and his pay was cut as a disciplinary measure for his failure to read and fix production orders correctly and for his failure to meet the company's production standards. Jt. App. at 33. He received a second formal written reprimand on January 20, 1983, the day before his arrest in the parking lot at the plant. His second reprimand put him on a ninety-day probationary period for running not one, but five rolls of material of the wrong width, another error of accuracy and judgment typical of an impaired employee. The reprimand stated that "[d]uring this time your work performance, attitude, and productivity will be monitored very closely. Your continued employment with this company is in your hand, as one more mistake such as this will result in your being

removed from this machine permanently." *Id.* at 33-34

On January 21, 1983, while grievant was at work, oficers of the Ouachita Parish Metro Narcotics Unit, pursuant to a search warrant, searched grievant's house and fouund two and one-half bags of marijuana, five marijuana cigarettes, weight scales, and marijuana cigarette paper. App. D. of Pet. at 34a. While the house was being searched, another officer engaged in surveillance of respondent's lot to detain grievant if he tried to get away. The officer observed grievant and two other employees walking in the plant parking lot where they entered grievant's car. After a few minutes, they exited grievant's car and walked over and got in a two-door white Oldsmobile Cutlass located two car-lengths from grievant's car. Grievant sat in the back seat of the white Cutlass and the other two employees sat in the front seat. When the other police officers drove onto the parking lot sometime later, the two men in the front seat of the car hurried inside the plant, but grievant remained outside the car. One officer found a lit marijuana cigarette in the right door ash tray of the white Cutlass and two of the officers smelled the aroma of marijuana smoke emanating from the white Cutlass. The police officers arrested grievant.

After his arrest at the parking lot, the grievant signed a form permitting the search of his car. Jt. App. at 37. A police officer searched his car and found a plastic scale case with gleanings which later proved to be marijuana. The scale case was obviously the case for the weight scale the police found at grievant's home. The police officer told no representative of respondent about the quantity of marijuana found in grievant's car. This was not discovered by respondent until about a week before the arbitration hearing when during a meeting with the police, undersigned counsel learned of this evidence. App. D. of Pet. at 37a. The lit marijuana cigarette found in the car on the parking lot

of respondent's plant and the marijuana gleanings in the scale case found in grievant's vehicle while at the plant were analyzed and determined to be marijuana. Jt. App. at 36; App. D. of Pet. at 37a.

Because grievant told respondent that the basis for his arrest was possession of marijuana *at his home*, and not possession or use *at the plant*, no detailed investigation of the arrest in the parking lot took place until a police officer informed respondent's president six days after the arrest that the police considered the plant to have a drug problem, that a lit marijuana cigarette had been found in a car on the company's premises, and that they had targeted grievant. App. D. of Pet. at 38a. Management investigated the incident, had three interviews with grievant and other employees, met with all the employees about the drug problem in the plant, and contacted the local union to discuss the situation. On February 4, 1983, management reviewed all the facts of the investigation, including the grievant's prior work record, and decided to terminate grievant which they did on February 7, 1983. *Id.* at 38a-40a. On April 12, 1983, grievant pled guilty to possession of the marijuana found in his home and was sentenced to a fine of $450.00 and costs. *Id.* at 40a.

The grievance was filed on February 7, 1983, *id.*; meetings were held at the interim stages of the grievance procedure, and on September 26, 1983, the arbitrator held the hearing. *Id.* at 25a. On October 31, 1983, the arbitrator sustained the grievance and ordered the company to restore the grievant to "his old job or an equivalent job for which the Grievant is qualified." *Id.* at 53a. On November 21, 1983, respondent filed a petition to set aside the arbitration award under section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185(a), and under the Arbitration Act, 9 U.S.C. § 4, on the grounds the award was against public policy, in excess of the arbitrator's powers,

irrational and such an imperfect execution of his powers that a mutual, final and definite award could not be made. Jt. App. at 4-6. Motions for summary judgment were filed by both parties and on October 3, 1984, the district court vacated the arbitrator's award on the basis that "an award that is contrary to law or public policy need not be enforced, " App. C of Pet. at 20a, and that the award reinstating the grievant offended the public policy against marijuana possession and the public policy against the operation of dangerous machines by workers impaired by drugs. *Id.* at 22a.

Petitioners appealed the decision to the United States Court of Appeals for the Fifth Circuit and a majority of the judges on the panel agreed with the district court that reinstating the grievant contravened the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739, 743 (5th Cir. 1985), *cert. granted;* App. A of Pet. at 1a, 7a. A writ of certiorari to review the Fifth Circuit's decision was granted by this Court on January 12, 1987.

SUMMARY OF ARGUMENT

The arbitrator in this case reinstated a drug user to operating hazardous machinery in the paper industry. The district court and the Fifth Circuit found that this award violated the public policy against marijuana possession and against operation of dangerous machines by workers under the influence of drugs. The courts below properly exercised the "public policy exception" articulated by this Court in *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers,* 461 U.S. 757 (1983). The public policy grounds relied upon by the courts below are well defined and dominant and are found in the laws of this nation and

the State of Louisiana which prohibit the use or possession of illegal drugs, such as marijuana, and which emphasize public health and safety in the workplace, and are supported by a large amount of scientific evidence that marijuana usage impairs judgment and coordination and is a danger in the workplace of a hazardous industry.

The public policy exception recognized in *W. R. Grace* should be exercised by the courts particularly in the fields of public health and safety as the courts of appeals have so done. Respondent submits that the national labor policy is undermined by the isuance of irrational awards which fly in the face of public policy and common sense, and that national labor policy will benefit ultimately by judicial rejection of arbitrator's awards which offend public policy in the areas of public health and safety.

In addition to the public policy exception, the arbitrator's award should be vacated on the grounds urged by respondent below, that the arbitrator's award dispenses "his own brand of industrial justice," exceeds his power, is irrational and is so imperfectly executed that no court should enforce it.

ARGUMENT

I

THE FIFTH CIRCUIT PROPERLY VACATED THE ARBITRATOR'S AWARD BASED ON PUBLIC POLICY

A. THE PUBLIC POLICY GROUNDS RELIED UPON BY THE FIFTH CIRCUIT ARE WELL DEFINED AND DOMINANT AND WERE ASCERTAINED BY REFERENCE TO THE LAWS AND LEGAL PRECEDENTS

In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), this Court, although limiting the judicial review of labor arbitration awards, noted that:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Then in 1983 in *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983), this Court developed an exception to enforcement of arbitral awards.

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. *Hurd v. Hodge*, 334 US, at 35. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."

W. R. Grace, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

Respondent submits the United States Court of Appeals for the Fifth Circuit properly exercised the public policy exception set forth in *W. R. Grace* by relying upon well-defined policies against the use or possession of illegal drugs and of public health and safety. The dangers to

health and safety faced by the citizens of this nation and by employees of American industry because of the use of illegal drugs are well defined and dominant. We live in an age when a promising young sports figure such as basketball player Len Bias died from a cocaine overdose, and New York Mets star pitcher Dwight Goodin underwent drug treatment to cure his cocaine habit after his performance fell dramatically from that of the previous season. Entertainers Stacy Keach and David Crosby, to mention only two, are jailed for possession of illegal drugs. The ranks of Alcoholics Anonymous and Narcotics Anonymous grow daily. The number of drug and alcohol treatment centers has mushroomed to handle the growing number of Americans trying to keep their lives from being destroyed.

Numerous studies have been made of the cost and effects of the proliferation of drug use in the American workplace.

> The cost to the American economy is enormous: nearly $26 billion--including $16.6 billion in lost productivity alone--according to one authoritative study. . . . But others put the figure much higher. Employees who use drugs on the job are one-third less productive than straight workers, three times as likely to be injured and absent far more often. The indirect cost to the economy is impossible to measure.

Taking Drugs on the Job, Newsweek, Aug. 22, 1983, at 52.

The executive branch of our government has clearly enunciated a public policy against the use of drugs in the American workplace. In a speech on August 4, 1986, President Ronald Ragan called for the American people to join him in a national crusade against drugs listing six goals in a national strategy to eradicate drug abuse. The goals were

a drug-free workplace using mandatory drug testing "where the employees have the health of others and the safety of others in their hands," Speech by President Ronald Reagan on Drug Abuse--National Campaign, 22 Weekly Comp. of Pres. Doc. 1040, 1042 (Aug. 11, 1986); drug-free schools; better drug treatment facilities; more international cooperation in the war on drugs; prompt and severe punishment for all drug dealers; and expanded public awareness about the dangers of drugs. *Id.* at 1041-42.

Further, on September 15, 1986, President Reagan signed Executive Order 12,564 requiring federal employees to refrain from the use of illegal drugs and asserting that persons who use illegal drugs are not suitable for federal employment. The Order called for establishment of drug testing of sensitive-position employees, and of other employees when there is a reasonable suspicion that the employee uses illegal drugs, in examinations following accidents or unsafe practices and in certain other circumstances. The Executive Order makes the following policy declarations, *inter alia:*

> Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year . . . .
>
> . . . .
>
> The use of illegal drugs, *on or off duty,* by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, *on or off duty,* by Federal employees also can pose a serious health and safety threat

> to members of the public and to other Federal employees . . . .

Nov. 1986 *U.S. Code Cong. & Admin. News* No. 9, at B50-51 (emphasis added).

The legislative branch of our federal government also has legislated against drug use in the workplace. Congress passed the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i, which forbids discrimination against the handicapped by employers who have contracts valued in excess of $2,500.00 with the federal government by requiring in section 793 that federal contractors take affirmative action to employ and advance qualified individuals with handicaps as defined in subsections 706(8)(A) and (B). Subsection 706(8)(B) states that the term "individuals with handicaps"

> does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Thus, Congress has mandated that current drug users are not required to be hired or advanced in employment by federal contractors. Such individuals have no protection under the Rehabilitation Act of 1973.

Notably, in one recent case under the Rehabilitation Act involving the City of Detroit's refusal to hire marijuana users as firefighters, the district judge found that "within minutes of ingestion marihuana can cause physical reactions such as short-term memory loss, problems with coordination and thinking, and diminishment of the ability to take risks. This evidence proved that the use of

marihuana by a firefighter constituted a direct threat to the property and safety of the community." *McCleod v. City of Detroit*, 39 Fair Empl. Prac. Cas. (BNA) 225, 226 (E.D. Mich. 1985).

Federal criminal policy also prohibits the possession and use of controlled substances. The Controlled Substances Act was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in 21 U.S.C. §§ 801-966 and 42 U.S.C. §§ 257-261a), which was designed to strengthen law enforcement in the abuse of illegal drugs. Congress stated federal policy to be the following:

> The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

21 U.S.C. § 801(2).

Not only is the possession or use of controlled substances, such as marijuana, a violation of federal law, it is a violation of state laws all over America.[1] In Louisiana particularly, public policy is expressed in the criminal laws of the State of Louisiana which provide that possession of marijuana is a crime, and is a crime which is punishable by fine and imprisonment ranging from six months for a first offense to twenty years on a third conviction. La. R.S. 40:966(C) & (D); Jt. App. 38-39. Additionally, in the 1987

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1. "Although during the 1970s 11 states decriminalized marijuana possession for personal use by substituting small fines for jail terms, the trend may have reached its peak. A report by the National Academy of Sciences in 1982 found that the drug posed physical and emotional dangers sufficient to cause 'serious national concern.' " T. Denenberg & R. Denenberg, *Alcohol and Drugs: Issues in the Workplace* 21 (BNA 1983).

legislative session, the Louisiana Senate Committee on Labor and Industrial Relations passed for consideration by the Louisiana Senate a bill which disqualifies a person from receiving unemployment compensation benefits who is discharged for use of alcohol or illegal drugs. Minutes of the Proceedings of the Louisiana Senate Committee on Labor and Industrial Relations, Senate Bill 180 (May 13, 1987).

A further emphatic statement of national safety policy is found in the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678. Section 654 provides as follows:

> (a) Each employer--
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this chapter.
>
> (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.[2]

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2. An additional expression of federal safety policy is found in the Federal Mine Safety and Health Amendment Act of 1977, 30 U.S.C. §§ 801-962. At subsection 801(a) thereof Congress declares that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner." Thus, public health and safety policy is again paramount.

While it seems clear that reinstating a rule-violating user and possessor of drugs to operating hazardous equipment contravenes the duty of an employer to provide a safe workplace, one only needs to look to the *common sense* of the situation to find another source of public policy supportive of the Fifth Circuit's decision. Respondent submits that petitioners' concern with the sanctity of national labor policy as it tends to hold arbitrators' decisions basically inviolate overlooks the common sense absurdity of a result which reinstates a scofflaw drug user to operating hazardous equipment in the already risky paper industry.

In addition to the OSHA statute requiring the employer to provide a safe workplace, the Louisiana Worker's Compensation Law requires the employer to pay compensation to employees for "personal injury by accident arising out of and in the course of [their] employment." La. R.S. 23:1031. Also, under the traditional tort theory of *respondeat superior,* the employer would be liable to third parties for injuries inflicted by its impaired employee. Moreover, drug-impaired employees who commit intentional torts within the course and scope of their employment may subject employers to tort liability. *See Jones v. Thomas,* 426 So. 2d 609 (La. 1983) (cause of action sustained against an employer for the intentional acts of an employee). An employer also may be liable for negligence in its *retention* of employees who are drug users. *See, e.g., Becken v. Manpower, Inc.,* 532 F.2d 56 (7th Cir. 1976) (theory of negligent hiring as a cause of action was accepted); *Colwell v. Oatman,* 32 Colo. App. 171, 510 P.2d 464 (Ct. App. 1973) ($75,000 judgment against employer who negligently hired drunken employee who injured another employee). Clearly, the public policy grounds for not reinstating a drug user is well-established in the worker's compensation laws of Louisiana and the various states and in the civil liability of an employer for the negligent or intentional acts of drug-impaired employees.

The conclusion of the district court and the Fifth Circuit that the intoxicating effects of marijuana impair an employee's ability to safely operate dangerous machinery has been well-established by the scientific community. Based upon their clinical research, C. Nora Chiang, Ph.D. and Richard L. Haeks, Ph.D. reported the following:

> Marijuana use has been associated with decrements in behavior and cognitive performance. The incidence of detectable levels of THC [the psychoactive component in marijuana] in fatally injured drivers ranges from 3.7 percent to 37 percent . . . . While a direct causal effect of marijuana is difficult to establish from such studies because of the generally high incidence of alcohol in the subjects as well as lack of control groups, the indication is clear that a performance-impairing drug (THC) is present and is therefore likely to contribute to the factors leading to the accident.
>
> In laboratory investigations, it has been reported that THC may affect complex performance skills up to 24 hours after drug infestion. One study reports a "hangover" effect on the morning following a dose of marijuana (9 hours after smoking a marijuana cigarette of 3 percent THC) . . . . The mean performance of pilots in a flight simulator showed a trend toward impairment at 24 hours after smoking a cigarette of 2 percent THC . . . . These results have implications for THC effects on the performance of complex tasks the day after smoking when blood concentrations are very low.

Chiang & Hawks, *Urine Testing for Drugs of Abuse-Implications of Drug Levels in Body Fluids: Basic Concepts*, Res. Monograph Series 73, at 62, 64-66 (Nat'l Inst. on Drug Abuse 1986) (citations omitted).

J. Michael Walsh, Ph.D. and Stephen C. Yohay, explain the psychological effects of marijuana.

> The length of time that a drug will affect human performance depends to a great extent on the complexity of the task being performed. For example, marijuana has been shown to disrupt simple tasks (e.g., reaction time) for a relatively short period, i.e., 2 to 4 hours. However, for more complex cognitive tasks such as those requiring divided attention, information processing, and perceptual skills, the marijuana effects persist for at least 8 to 10 hours after the drug is smoked. A recent study involving pilots using flight simulators showed that marijuana produced significant impairment in flying skills even 24 hours after the drug was administered.

J. Walsh & Yohay, *Drug and Alcohol Abuse in the Workplace: A Guide to the Issues* 21-22 (1987))footnotes and emphasis omitted). Two researchers demonstrated that passive inhalation can produce subjective effects. Cone & Johnson, *Contact Highs and Urinary Cannabinoid Excretion After Passive Exposure to Marijuana Smoke*, 40 Clinical Pharmacology & Therapeutics 247, 253 (Sept. 1986).

Finally, Jerome A. Yesavage, M.D., writes:

> There is . . . extensive literature on THC use and human performance under the influence of THC. Several studies have shown effects on memory, attention, and perception; however, these effects were only rarely significant 4 hours after smoking. Kielholz et al. found general impairment in driving performance to last as long as 6 hours after the intake of THC. One study by the FAA found impaired performance on a number of

> cognitive tasks some 14 hours after enough alcohol had been ingested to produce a blood level of 0.1 mg/dl. The current data, from an even more complicated task, indicate impaired performance 24 hours after smoking THC. Thus, it appears that our ability to identify drug effects may depend on the complexity of the task needed.
>
> These results suggest a need for concern about the performance of those entrusted with complex behavioral and cognitive tasks within 24 hours after smoking marijuana. The subjects in this experiment were unaware of any effects on their performance, mood, alertness, etc. Some results may be applicable to other tasks, such as operating complicated heavy equipment or railway trains and switching procedures.

Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 Am. J. Psychiatry 1325, 1328 (Nov. 1985).

Thus, the scientific evidence is substantial and in agreement that marijuana usage causes significant impairment to the user for several hours after ingestion. An arbitral award reinstating a drug user to operating dangerous machinery ignores the scientific evidence of impairment and subjects the drug user, his fellow employees, and others to the dangers created by such impairment. The district court and the Fifth Circuit correctly relied upon the strong public policies against the use or possession of illegal drugs and of public health and safety and the obvious impairment associated with marijuana usage to support their determination that there is a public policy against the operation of dangerous machinery by persons under the influence of drugs or alcohol which warranted setting aside the award of the arbitrator.

B. THE SCOPE OF THE PUBLIC POLICY EXCEPTION MUST BE BROAD ENOUGH TO ENCOMPASS THE IMPORTANT POLICIES OF PUBLIC HEALTH AND SAFETY IN THE WORKPLACE

A balance must be drawn between the relatively unfettered power of labor arbitrators under the doctrine of *Enterprise Wheel, supra,* and the need for the federal judiciary to intervene in the face of absurd arbitration decisions which violate public policy. The policy exception articulated by this Court in *W. R. Grace, supra,* is the obvious vehicle for the judiciary to set aside arbitral awards which offend common sense and are a threat to public health and safety in the workplace.[3] Permitting absurd arbitral awards to stand where they conflict with national health and safety policy creates a disrespect and distrust for labor arbitration which will ultimately serve to undermine the institution of labor arbitration and national labor policy insofar as it promotes labor arbitration as a means of avoidance of disruptions of interstate commerce. The petitioners and the National Academy of Arbitrators as *amicus curiae* noted a perceived increasing trend to seek judicial relief from arbitral awards. They asert the danger is that judicial decisions setting aside arbitrators' awards will invite further litigation by others in the hope of success in vacating the order or in delaying its execution. Any increase in the number of petitions seeking judicial review of labor arbitrators' decisions may be the result of an increasing number of decisions which are not up to standard or in which the result is irrational or offensive to public policy and

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[3] Respondent does not seek in this case to determine the outer limits of the public policy exception. Respondent does seek to have this Court rule that the public policy exception should encompass, at the least, the public health and safety policies involved in arbitral awards which reinstate drug users to operating hazardous equipment.

the common sense of the parties.[4] A sufficient deterrent to frivolous attempts to vacate arbitration awards is the sanction of attorney fees under Rule 11 of the Federal Rules of Civil Procedure, which sanction petitioners sought, but which was denied.

In *S. D. Warren Co. v. United Paperworkers' International Union*, 815 F.2d 178 (1st Cir. 1987), the First Circuit set aside such a patently offensive decision. *S. D. Warren* involved facts very similar to the instant case. The employer also operated a paper mill and the union was the same international union. A police drug unit of the State of Maine investigated the drug problem at the employer's plant and as a result, twelve employees who were shown to have possessed or sold drugs in violation of the plant no-drug rule were discharged by the employer. The arbitrator found extenuating circumstances, decided that the discharge penalty was too great, and reduced the penalty

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[4] The observations of Robert A. Dufek and D. Michael Underhill reflect the sentiment of many employers.

> Despite the lip service paid to the "seriousness" of the offense, *Swift & Co.* [72 Lab. Arb. (BNA) 513 (Rentfro, Arb. 1979)] illustrates an attitude that pervades many arbitration decisions--that "soft" drug use in the workplace (particularly involving marijuana) is not a sufficiently serious problem to warrant discharge, although lesser penalties may be appropriate. [Citing *Watauga Industries*, 78 Lab. Arb. (BNA) 697 (Galambos, Arb. 1982).] Many arbitrators refuse to sustain a discharge notwithstanding the fact that the violation is clear and the rules unequivocal.
>
> The arbitrators often find some alleged "due process" problem with the discharge in terms of notice, investigatory interviews, or severity of the discipline. Fundamentally, however, the problem is often an unwillingness to impose a discharge--as opposed to a lesser penalty--for "soft" drug use, particularly when drug use has become so prevalent in society at large.

Dufek & Underhill, *Arbitration Can Thwart Employer No-Drug Policy*, Legal Times, Mar. 18, 1985, at 21.

to suspension. The arbitrator concluded that because the plant rule did not require mandatory discharge for violation of its drug rule, she had some latitude and could substitute a punishment less than discharge. The First Circuit was mindful of the teachings of the Steelworkers' Trilogy,[5] but stated that "the courts have not been willing to sacrifice logic, reason, and sound principles of contract law on the altar of the practicality of giving unlimited power to arbitrators and absolute deference to their interpretations of collective bargaining agreements." *Id.* at 182. The court found that the arbitrator imposed a punishment which the parties had not bargained for and that the award did not draw its essence from the collective bargaining agreement.

The court further considered the issue of public policy, noting that, as here, this was a paper mill where the employees handled bulky materials and drove heavy machinery and trucks. The arbitrator concluded that "drug-dealing constitute[s] a danger to all employees' safety." *Id.* at 186. The court concluded:

> In view of the evidence and the conclusion of the arbitrator, we conclude that the use and sale of drugs in this shop is dangerous and constitutes a threat to the safety of all the employees. It also constitutes a violation of the state and federal law.
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> . . . .
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> . . . Furthermore, the nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In

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[5] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

> particular, the work shop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition.
>
> We conclude that there is a well-defined public policy against the use of drugs in the workplace.

Id.

The unions argued to the First Circuit, as they argue to this Court, that in order to apply public policy a statute must exist providing that possession or distribution of marijuana *in the workplace of a paper mill* is a crime punishable by a jail sentence. This argument was rejected. The court stated that "[t]he use of drugs in the case before the court created a dangerous situation that imperiled the safety of fellow employees. A hostile atmosphere developed where innocent workers were grouped together with 'junkies.' . . . This arbitration award cannot be enforced as a matter of public policy." *Id.* at 187 (citing the Fifth Circuit's decision in *Misco*). Thus, the First Circuit, like the Fifth Circuit in *Misco* and in *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), quite reasonably applied the well-expressed and obvious public health and safety policies involved in not requiring employers to retain employees who violate rules against drug use or possession. These results are dictated by public policy and common sense.

Another utilization of public policy to set aside an arbitral award is found in the First Circuit's earlier decision in *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984). There, a postal office window clerk who was having financial difficulties embezzled $4,325.00, allegedly with an intent to repay the funds later. Incredibly, the arbitrator ruled that the dishonest act did not constitute just cause. The First Circuit vacated that award as against a public policy found not only in positive law, but also in "the clear dictates of common sense." *Id.* at 825. The court noted the adverse effects on other employees of reinstating a dishonest employee and the diminishing of public trust in the postal service and the federal government by condoning dishonesty. *Id.* The First Circuit commented in *S. D. Warren* that drug use in the workplace involved a more life-threatening situation than the postal service case. Respondent submits that when public policies are compared, the policy of public health and safety is, indeed, the more substantial policy.

The public policy against the possession or use of illegal drugs is well-established. The policy of preventing employees who are impaired by drugs or alcohol from operating dangerous machinery and endangering themselves and fellow employees is also well-established. *Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983) ("[T]he public policy of preventing people from drinking and driving is embodied in the case law, the applicable regulations, statutory law, and pure common sense."); *Borsari v. Federal Aviation Administration*, 699 F.2d 106 (2d Cir.),

cert denied, 464 U.S. 833 (1983) (dismissal of air traffic controller based upon sale and possession of illegal drugs upheld as promoting the efficiency of the service); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303, 1305 (D. Minn. 1986) ("The strong federal policy against the use, sale, and transporting of cocaine is too well known to require discussion here."); *World Airways v. International Brotherhood of Teamsters*, 578 F.2d 800 (9th Cir. 1978) (in a case predating *W. R. Grace*, the court found a strong federal policy existed in assuring the safety of air travel and held an arbitrator exceeded his authority when he reinstated a pilot who had a history of judgmental errors and deficiencies causing threats to safety).

In *E. I. DuPont de Nemours & Co. v. Grasselli Employees Independent Association*, 790 F.2d 611 (7th Cir.), *cert. denied*, ____ U.S. ____, 107 S. Ct. 186 (1986), the Seventh Circuit considered the employer's public policy arguments that the arbitrator failed to give sufficient consideration for safety in the workplace in reinstating an employee who had a mental breakdown, flew into a rage, struck a chemical operator, and attempted to create a chemical reaction that could cause damage to property and person. Unlike the arbitrator here, the *E. I. DuPont* arbitrator *considered* the possibility of future danger to company employees and property, but concluded based upon substantial evidence that the dangers were not likely because of the remoteness of a future breakdown. The court rejected the union's argument, which is also made in the instant case, that an arbitration award cannot be overturned on public policy grounds unless the contract as constructed by the arbitrator violates some rule of positive law. "[T]he Courts have never construed the public policy exception so narrowly." *Id.* at 616. The distinction in *E. I. DuPont* is the arbitrator made a factual finding which was supportable by the evidence that *workplace safety* would *not* be harmed by reinstatement. Undoubtedly, the Seventh Circuit was

willing to apply the public policy exception to a public safety situation in the workplace had it been appropriate to do so. "Of course we should overturn an arbitration award if it violates public policy." *Id.* at 615. There the arbitrator did his job in weighing the pros and cons of reinstatement versus possible threats to safety of other employees and of company property, and ordering reinstatement. In the instant case, the arbitrator *ignored* the respondent's argument that reinstatement was inappropriate on public policy grounds. When an arbitrator *ignores* public policy issues, the courts must act. The arbitrator's decision in *E. I. DuPont* does not offend common sense as did the arbitrator's decision here and in *S. D. Warren.* Respondent submits that the courts must retain the power to vacate awards producing absurd results which fly in the face of public health and safety policy.

Although the First, Fifth, and Seventh Circuits appear in agreement in applying the public policy exception,[6] one circuit court of appeals holds that the public policy exception is *extremely narrow.* In *American Postal Workers Union v. United States Postal Service,* 789 F.2d 1 (D.C. Cir. 1986), the District of Columbia Circuit, unlike the First Circuit, refused to utilize the public policy exception to vacate an arbitrator's award reinstating a discharged postal

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[6] In *Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir. 1986), *appeal pending,* the Ninth Circuit refused to vacate an arbitrator's award which reinstated two employees who were not legally entitled to work in this country. The court found that the decision of this Court reversing a NLRB backpay and reinstatement award to illegal aliens in *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984), did not establish a public policy cognizable under the *W. R. Grace* public policy exception. *Bevles,* 791 F.2d at 1393. However, *Bevles* does not seem to limit the Ninth Circuit's willingness to vacate arbitral awards on the basis of a conflict with public health and safety policy, as it demonstrated in *World Airways v. International Brotherhood of Teamsters,* 578 F.2d 800 (9th Cir. 1978) (court vacated an arbitrator's award reinstating a pilot who had a history of judgmental errors and deficiencies causing threats to safety).

employee. The court held that "[t]he arbitrator's award was not itself unlawful, for there is *no legal proscription* against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct." *Id.* at 8 (emphasis added). The District of Columbia Circuit also felt that the First Circuit in the *United States Postal Service* case, in which the court vacated an arbitrator's reinstatement of a convicted felon, did not follow the Supreme Court's decision in *W. R. Grace*. *Id.* at 9. Thus, the District of Columbia Circuit has rejected the interpretation of *W. R. Grace*[7] that respondent submits, and the First, Fifth, and Seventh Circuits have adopted, should be followed in cases involving the public health and safety.

The petitioners contend that the existence of a *specific legal proscription* making reinstatement of a particular class of employees illegal is the sole basis upon which the public policy exception of *W. R. Grace* should be exercised. The petitioners argue here, as they argued to the First Circuit in *S. D. Warren*, that unless a law exists prohibiting the employment of drug users in paper mills, no source of public policy exists and the public policy exception of *W. R. Grace* should not be applied. This interpretation is so narrow that it cannot be what was intended by this Court in *W. R. Grace*. If this Court had intended to limit the *W. R. Grace* exception to situations where an award violates a positive law, this Court would have said so. *W. R. Grace's* language permits reliance upon principles that are "well defined and dominant" and which can be

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[7] In *Northwest Airlines v. Air Line Pilots Association, International*, 808 F.2d 76 (D. C. Cir. 1987), *appeal pending*, the District of Columbia Circuit adhered to its narrow interpretation of the *W. R. Grace* exception and, in affirming an arbitration award reinstating a pilot who was discharged for flying a passenger jet while intoxicated, held that a court must enforce an arbitration award unless the award "contravene[s] established law" or "require[s] an unlawful act." *Id.* at 84.

ascertained by reference to the "laws and legal precedents." This language permits broader sources of public policy than violations of positive law. The petitioners' narrow view of the public policy exception would completely gut *W. R. Grace* of any meaning whatsoever. It is unlikely that any legislature will pass a law prohibiting the employment of specific classes of individuals such as drug users in specific industries. Consequently, if petitioners' argument is adopted, *W. R. Grace's* public policy exception becomes only pretty prose.

Petitioners' concern that the public policy exception adopted by the Fifth Circuit would leave too much room for second-guessing of arbitration decisions, Brief for the Petitioners at 22, fails to recognize that much room already exists based upon the well-known grounds of vacating arbitrators' decisions which exceed their powers and are unfaithful to the language of the collective bargaining agreement. Respondent submits that recognition by this Court that public health and safety are paramount public policies in no-drug rule discharge cases will not create a flood of judicial second-guessing of arbitrators' awards. Petitioners' position also does not truly acknowledge the strength and the dominance of sources of public policy concerning public health and safety such as those discussed at the beginning of this brief. To impress their narrow view of the *W. R. Grace* exception upon this Court, petitioners, as did the arbitrator, are staring at the tree and not seeing the forest of reality of the health and safety hazards in America's drug-filled workplaces and are addressing the question in terms of abstract theories of alleged expertise of labor arbitrators and the sanctity of the labor arbitration process despite the existence of absurd arbitral results which fly in the face of common sense and clear public policy.

The voice of reason must be kept a part of the labor

arbitration process lest employers, who are required to stomach irrational or absurd arbitration decisions which violate clear public health and safety policies, be tempted to reexamine the desirability of arbitration itself as a means of resolving disputes between them and labor. Additionally, employers may attempt to seek relief from irrational arbitral awards by exempting no-drug rule violations or other safety matters from the coverage of the grievance-arbitration machinery. The unions will no doubt strongly resist such exemptions resulting in disruptions of interstate commerce. It is even possible that absurd arbitration results will be so unacceptable that employers may reevaluate their entire relationship with unions.

A perfect example of the disruptive effect of an irrational arbitral award is found in the accusation of the petitioners' international representative that the respondent's president telephoned him after the arbitration decision was received to inform him that the union was responsible for turning loose a dope dealer, that the union was a detriment to the City of Monroe, Louisiana, and that he was going to do everything he could, including talking to everyone he knew in Monroe, to destroy the union. *See* Jt. App.at 28-29 (affidavit in support of claim for attorney fees). Indeed, according to petitioners' representative at least, the offensive arbitration award in this case caused a potentially great disruptive effect on the stability of labor relations at respondent's facility. Respondent's president (in an affidavit) denied the remarks about destroying the union, but admitted that he told the union representative he was disappointed in the union's stance in backing that employee because of his drug problem, and that he was personally convinced that the reinstatement of the grievant would have a serious effect upon the younger employees in the plant by increasing and encouraging the possession or use of drugs on and off the job. *Id.* at 41. Absurd arbitration awards which have a disruptive effect upon the

workplace and upon national labor policy were not what respondent or other employers bargained for.

In this case, the company rule provided under the heading of *Causes for Discharge:*

> 1. Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances.

App. D of Pet. at 31a. The rule clearly banned the possession of just a residue or a large amount of marijuana by respondent's employees, and that is exactly what the respondent intended when it bargained for that rule. The rule does not require that the drug user be impaired at the time of the violation. Possession or consumption of drugs at the plant is the violation. The respondent did not bargain for the arbitrator's decision ignoring that rule, and the arbitrator's decision was so obviously against the public interest in reinstating a drug user to operating hazardous equipment that the public policy exception of *W. R. Grace* clearly was applicable to the case.

Petitioners argue that judicial refusal to enforce an arbitrator's award creates "a regime in which the employer exercises absolute and unlimited power." Brief for the Petitioners at 15. When the courts set aside an arbitrator's decision involving possession or use of drugs or alcohol, the petitioners argue that the employer in such cases is free to decide on its own whether to discharge or otherwise discipline the employee. This overlooks the fact that an employer still has to have "just cause" to terminate employees who are protected by a grievance-arbitration procedure, and an employer cannot gamble that a court will overturn an arbitration award. And if the union thinks the

employer has to much discretion, the union, too, can bargain for limitations upon that discretion. The only limitations that the courts have imposed upon drug possession cases are common sense limitations which the public policies of health and safety in the workplace dictate.

Nothing could be more devastating to respondent's efforts to stamp out dangerous drug use at its paper-converting plant than the reinstatement of a victorious grievant who flouted the no-drug rule and the criminal laws of this nation by his unquestionably illegal drug use and possession of marijuana at the plant. The banner would wave to all other employees that their union and the federal labor laws would protect illegal drug use. The employees will know that if grievant can get away with it, so can they. "Not only would there be serious tension and ill will between . . . the two employees and management, but, perhaps more important, reinstatement in such circumstances could well be and *invitation* to continue such misconduct on the part of the reinstated employees *as well as others.*" *NLRB v. Big Three Welding Equipment Co.*, 359 F.2d 77, 84 (5th Cir. 1966) (emphasis added). "[W]e cannot avoid the common sense implications that requiring the rehiring of [grievant] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed--the Union could always fix it if they were caught." *United States Postal Service*, 736 F.2d at 825. The hostile atmosphere which developed at *S. D. Warren*'s plant when nondrug users were grouped together with drug users is an example of another strong consideration militating against reinstatement of a drug user. *See S. D. Warren*, 815 F.2d at 187.

II

EVEN IF THIS COURT WERE TO LIMIT THE PUBLIC POLICY EXCEPTION TO CASES IN WHICH AN ARBITRATION AWARD CONFLICTS WITH POSITIVE LAW, THE ARBITRATOR'S AWARD SHOULD BE VACATED BECAUSE IT EXCEEDS THE ARBITRATOR'S POWER, IS IRRATIONAL, IS IMPERFECTLY EXECUTED, AND IS A DISPENSATION OF "HIS OWN BRAND OF INDUSTRIAL JUSTICE"

Although the courts below vacated the arbitrator's award on public policy grounds, respondent further submits, as it did in its petition to the district court, Jt. App. at 4, that the arbitrator's award was properly vacated because it exceeds the arbitrator's power, is irrational,[8] is imperfectly executed, and is a dispensation of "his own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. The arbitrator's award does not comport with the

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[8] In *Loveless v. Eastern Air Lines*, 681 F.2d 1272 (11th Cir. 1982), the court suggested that three grounds existed for substantive review of an arbitration award:

> (1) whether the award is irrational, *see, e.g., Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 . . . (1965) ("wholly baseless and completely without reason") . . .;
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> (2) whether the award draws its essence from the letter or purpose of the collective bargaining agreement, *United States Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. [574,] 597 [1960]. . .; and
>
> (3) whether the arbitrator conformed to a specific contractual limitation upon his authority . . . .

Loveless, 681 F.2d at 1276. Respondent urges these three grounds, *Interalia*, as a basis for overturning this arbitration award.

guidelines of the federal Arbitration Act, 9 U.S.C. § 10.[9]

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his *informed judgment* to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel, 363 U.S. at 597 (emphasis added).

Respondent bargained for this arbitrator's "informed judgment," not "his own brand of industrial justice." When an arbitrator does not bring his informed judgment to the case, the collective bargaining agreement is in effect breached. The aggrieved party must resort to the courts for relief. Respondent argued to the arbitrator that the grievant should not be reinstated because of his unfitness for employment and the public policy consideration with respect to plant safety. *See* App. D of Pet. at 41a. The arbitrator ignored this issue completely in his 33-page opinion and failed to make any finding whatsoever with respect to this very important issue. This was an abdication of his responsibility as an arbitrator.

The arbitrator's award exceeded his authority and dispensed his own brand of industrial justice when he determined that the respondent's exercise of discretion in disciplining grievant by discharging him was unreasonable because he found that the company rules say nothing about

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[9] *See S. D. Warren Co. v. United Paperworkers' International Union*, 815 F.2d 178 (1st Cir. 1987) (the federal Arbitration Act provisions held applicable to labor arbitration).

immediate discharge, and because reading on duty and using or possessing marijuana did not have equal weight for purposes of discharge, although both are listed under the rules as causes for discharge. *Id.* at 45a. The arbitrator ignored the management rights clauses set forth above in the statement of the case and substituted *his discretion* for the *employer's discretion.*

Respondent successfully bargained for *extreme discretion* in the enforcement of its plant rules. It had the right to state which conduct was a dischargeable offense. Yet, the arbitrator states that because "reading on duty" is included as a cause for discharge, respondent's position, that discharge was warranted with respect to possession or use of marijuana at its plant in violation of the law, was not reasonable! On the basis of this specious reasoning, the arbitrator found that element two of the seven-element proof formula was not proven.[10]

At the same time, the arbitrator acknowledged that the respondent was in the paper-converting industry, that the industry was hazardous generally, and that the machine operated by grievant was particularly hazardous because of the sharp edges used to cut rolls of paper. App. D. of Pet. at 31a. The arbitrator even tracked the history of the marijuana problem at the plant and the efforts of management to stop it by holding meetings with employees warning them about violations of the rule prohibiting the possession and use of drugs at the plant. He recounted the problems with production and quality on grievant's shift and grievant's judgmental-type errors for which he received two reprimands. Despite all of this, he inexplicably found that respondent's position with respect to grievant's conduct was *unreasonable.* The arbitrator

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[10] For the listing of the seven elements often used by arbitrators in a discharge case, see App. D of Pet. at 44a.

wrongfully *subtracted* from the collective bargaining agreement the respondent's discretion to determine what was a cause for discharge and what was not a cause for discharge.

The arbitrator also concluded that respondent failed to investigate before discharge and that the investigation was not fair, and, therefore, did not establish elements three and four. For instance, the arbitrator felt that "some higher, detached Company official, " *id.* at 47a, should have conducted the investigation. The Fifth Circuit observed that the arbitrator ignored his own findings that the company president "launched an investigation of the situation," with the assistance of the production supervisor. *Id.* at 39a. The arbitrator also ignored other of his own findings that "the management team met and they decided to have a meeting with the Grievant and some other employees they thought might have been involved," *id.*, that they in fact met with other employees possibly involved, that they had three interviews with grievant about the situation, that they discussed the situation with the local union president, and that all of this was done within a week and before grievant was terminated. *Id.* at 38a-40a. The arbitrator's reasoning is irrational and unfaithful to his obligation to utilize his "informed judgment."

The arbitrator's irrational reasoning does not end there, as he found as to element five "that the Company has not proven by *any level* of evidence that the Grievant was in violation of the Rule." *Id.* at 51a. (emphasis added). Although the police did not catch grievant with a marijuana cigarette in his hand, they did find a lit marijuana cigarette in his constructive possession.[11] Since the arbitrator accepted the police officer's testimony that grievant was in the car with a lit marijuana cigarette, his

[11] *State v. Smith*, 257 La. 1109, 1114, 245 So. 2d 327, 329 (1971) ("[A] person may be deemed to be in joint possession of a drug which is in the

conclusion that grievant was not in possession of marijuana is patently incorrect. The arbitrator did accept as established that grievant brought marijuana onto the plant on the night of January 21, 1983, in violation of the company rules.[12] However, the arbitrator refused to consider this evidence, even for the purposes of determining whether grievant was suitable for reinstatement or of corroborating the fact that on January 21, 1983, the grievant violated respondent's rule against the possession or use of drugs at the plant.

Grievant's arrest and subsequent plea of guilty to possessing two and one-half bags of marijuana, five

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(footnote 11 continued)

physical custody of a companion, if he willfully and knowingly shares with the other the right to control of it."); *State v. Porter*, 296 So. 2d 302 (La. 1974) (conviction of defendant upheld although no marijuana was found on defendant, where marijuana was found near him on the ground and in his car where several friends were seated and from which he had exited two or three minutes before his arrest).

[12] The Fifth Circuit noted, with respect to the no-drug rule, the following:

> The rule draws no distinctions between "residue" and "usable quantities," nor need it do so. Yet, although [grievant] violated it, the award directs his reinstatement at work on the slitter-rewinder. This is contrary to *Amalgamated Meat Cutters*, in which there was no finding that the driver was drunk, only that he had taken a drink on the job. In adopting plant rules, an employer is not narrowly limited to denouncing acts already made criminal by the law but may, at a minimum, adopt reasonable prophylactic measures going beyond the statutes. As examples, we think it scarcely open to doubt that rules forbidding the introduction of drug paraphernalia onto plant premises (with or without the accompanying drugs) or firearms (loaded or not) would be valid--and the former a valid expression of the policy which we have discussed. If so, it follows that a rule forbidding the introduction on plant premises of marijuana in any quantity whatever would be equally so.

Misco, 768 F.2d at 742-43; App. A of Pet. at 6a-7a.

marijuana cigarettes, a weight scale, and marijuana cigarette paper at his home, and the action of grievant and his two companions in first stopping at grievant's car, in which marijuana was found by the police, before entering another car in which grievant and a lit marijuana cigarette were found and from which the police officer smelled marijuana smoke, all of which was accepted by the arbitrator as proven, corroborate respondent's conclusion that grievant had violated a company rule.[13] The arbitrator also ignored when considering this issue that there was evidence of drug use on the second shift and that grievant had been reprimanded twice for judgmental errors typical of drug-impaired employees. Respondent bargained for informed judgment, and not, as the Fifth Circuit described, a "baffling view of evidence," *Misco*, 768 F.2d at 741 n.2; App. A of Pet. at 3a, that lacks any degree of common sense. Rather, respondent received from the arbitrator a discussion of tangents that took him far from the real isues.

As to element six, the arbitrator found that respondent had discriminatorily enforced the rule prohibiting the possession or use of illegal drugs, although respondent had "presented *uncontroverted* testimony . . . that the rule had always been enforced," App. D. of Pet. at 51a (emphasis added), because "the Company did not present any specific evidence to support its contention." *Id.* He made this ludicrous finding because allegedly nothing was presented by respondent with respect to its actions concerning the *alcohol* found in the car where the smoking of the marijuana took place. In other words, the arbitrator is saying

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[13] The arbitrator in *General Portland, Inc.*, 62 Lab. Arb. (BNA) 709, 714 (Autrey, Arb. 1974), would no doubt find that the confiscation of marijuana from grievant's vehicle "would be one type of evidence which would very strongly corroborate the testimony of the investigator." That arbitrator also stated that "[t]he testimony of a supervisor to the effect . . . that there had been discovered a partially smoked marijuana cigarette in the area frequented by [grievant] . . . could have been corroborating evidence." *Id.*

that because there was no evidence of the company's investigation of the alcohol, the company's enforcement of the rule against marijuana was discriminatory. Compounding this irrational approach, the arbitrator also ignored the testimony of the production manager that he had investigated the presence of the whiskey bottle in the car with the lit marijuana cigarette. Respondent submitted an affidavit from the production manager to the district court restating that testimony in order to preserve its right to challenge this arbitration award, Jt. App. at 42, as no transcript of the hearing was made. The arbitrator also ignored the management rights clause of the collective bargaining agreement which clause gave respondent the right to "unilaterally establish, modify, and enforce the plant rules" and which declares that "the company's failure to exercise any function or right . . . *shall not be deemed* a waiver of its rights to exercise such function or right." *Id.* at 14 (emphasis added). Respondent did not waive its right to discipline for drug use and possession by failing to discipline for alcohol possession. This exercise of arbitral reasoning is not the "informed judgment" respondent bargained for, but rather the arbitrator's "own brand of industrial justice."

Finally, the arbitrator determined that the degree of discipline, *i.e.*, discharge, was not reasonably related to the nature of the offense and the employee's past record. In so deciding, the arbitrator ignored grievant's reprimands on August 5, 1982, for performance problems, *id.* at 33, and on January 20, 1983, one day before his arrest, for running not one, but five rolls of paper at the wrong width through the slitter rewinder for which grievant was placed on a ninety-day probationary period. *Id.* at 34-35. The second reprimand even stated that one more mistake would cause permanent removal. *Id.* at 35. The grievant was on probation at the time he possessed and used marijuana at the plant, and yet the arbitrator found the discharge penalty too

severe and not reasonably related to grievant's past record. In *Grand Rapids Die Casting Corp. v. Local Union No. 159, United Automobile, Aerospace & Agricultural Implement Workers*, 684 F.2d 413 (6th Cir. 1982), the arbitrator improperly substituted his own procedural rules concerning discharge in place of those agreed upon by the parties in the collective bargaining agreement. "In setting aside [the] discharge for the reasons given the award did not draw its essence from the collective bargaining agreement. Rather, the arbitrator substituted terms and discipline he felt were reasonable for the terms of the agreement." *Id.* at 416. The arbitrator exceeded his power under the collective bargaining agreement by substituting his discretion for respondent's discretion to discipline by discharging grievant, Jt. App. at 19, especially when the misconduct is listed as one of the causes of discharge.

The only element the arbitrator found respondent to have proved was that grievant was forewarned. App. D. of Pet. at 44a-45a. Despite the overwhelming evidence of rule violation known to respondent at the time of grievant's discharge and the accepted evidence, although later discovered, of a clear violation of possession of marijuana at the plant, the arbitrator found deficiencies in the other six elements of proof although requiring a standard of proof, not of beyond a reasonable doubt, but merely that "the level of evidence must be truly substantial and not flimsy." *Id.* at 48a. "[I]f the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling then the Court can strike down the award." *Safeway Stores v. American Bakery & Confectionery Workers International Union*, 390 F.2d 79, 82 (5th Cir. 1968).

The Fifth Circuit appropriately summarized the arbitrator's opinion and award as follows:

> The arbitrator in today's case, focusing chiefly on his conception of "industrial due process," ruled for [grievant] in great part because the employer did not at the time it discharged him *know* of the marijuana residue that he undeniably brought onto the plant parking lot. . . .
>
> . . . [I]t is that his narrow focus on [grievant's] procedural rights has led him to enter an award directing the employer to put [grievant] back to operating a hazardous machine, dangerous to himself and to others at a time when the arbitrator knew that in fact [grievant] *had* brought drugs onto company premises, in violation of Louisiana law and of a clearly-stated company rule. . . . Gazing at the tree, and oblivious of the forest, the arbitrator has entered an award that is plainly contrary to serious and well-founded public policy.
>
> Such an award overrides the employer's attempt to protect the safety of its employees, including [grievant], in the name of safe-guarding [grievant's] abstract procedural rights against a determination by the employer that the arbitrator knew was in fact true: that [grievant] *did* bring marijuana onto his employer's premises.

Misco, 768 F.2d at 743; App. A of Pet. at 7a.

This arbitration award is the arbitrator's "own brand of industrial justice," and should be set aside as in excess of the arbitrator's powers, as irrational, as unfaithful to the collective bargaining agreement, and as imperfectly executed.

CONCLUSION

The district court and the Fifth Circuit properly vacated the arbitrator's award reinstating a drug user to operating hazardous equipment as against public health and safety policy. The public policy with respect to the possession and use of illegal drugs in the workplace and their impact on public health and safety is well defined and dominant, and is ascertainable by reference to the laws and legal precedents. Following *W. R. Grace* the courts below properly exercised the public policy exception and vacated the arbitrator's award. Even if this Court adopts a narrow construction of the public policy exception and concludes that the above public policy is not included therein, the arbitrator's award should be vacated because it exceeds the arbitrator's power, is irrational, is imperfectly executed, and is a dispensation of "his own brand of industrial justice."

Based upon the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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